No. 11650

In the United States Circuit Court of Appeals

For the Ninth Circuit

H. W. FOWLER and U. Z. FOWLER,
Appellants,

vs.

CROWN-ZELLERBACH CORPORATION,
Appellee.

APPELLEE'S BRIEF

Upon Appeal from the District Court of the United States for the District of Oregon.

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STATEMENT OF THE CASE

The judgment from which this appeal was taken was entered pursuant to Rule 50 (b). This rule provides that whenever a motion for a directed verdict is denied "the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion." The rule further provides that "if a verdict was not returned such party, within ten days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict."

As appears from the recitals of the judgment (Tr. of R. 40-1) defendant moved for a directed verdict, the court reserved decision on said motion, the jury was discharged without having returned a verdict, and defendant within ten days after the jury was discharged filed a motion for judgment "in accordance with its motion for a directed verdict." The motion was granted and the judgment accordingly entered.

In granting this judgment the court necessarily was convinced that plaintiffs had failed to produce sufficient evidence to take their case to a jury, that is, that they had failed to make a case for the jury that defendant violated any of plaintiff's rights or that plaintiffs were in any way damaged by any act of the defendant. Nothing in the record presented to this court remotely suggests that the trial court was in error in arriving at such conclusion. Despite vague suggestions in appellants' brief to the contrary (particularly page 6) we are justified in assuming — in fact must assume — for purposes of this appeal that plaintiffs introduced no substantial evidence in support of the many allegations of wrongful conduct on the part of defendant, or that they failed to prove any damage.

Appellants have brought the case to this court upon an entirely different theory. They say that they were prepared to prove that at some undesignated time subsequent to July 9, 1944, defendant installed a sewage disposal system and that it was installed in such a manner "as to be liable to contaminate" the waters of Lake Tahkenitch — which belong to the State of Oregon —,

and that they could have proven that at some unspecified date "actual tests" were made of the water and that it "was and is actually contaminated by these sewers, rendering it unfit for use as a bathing resort."

They have in the record what purports to be an offer of proof (Tr. of R. 74, Br. 3) but as we shall show it does not by any means comply with the legal requirements for an offer of proof.

Appellants also complain that the court "erred in ruling, in effect," that by closing their resort to the general public on July 9, 1944, plaintiffs "waived their rights to any damages to their property or property rights inflicted by the action of defendant subsequent to said date." However since the record does not point to any evidence from which any inference of damage to plaintiffs can be inferred either prior or subsequent to that date we take it that this assignment of error, if properly presented at all, only becomes material in connection with the above contention regarding the alleged contamination of the lake by defendant's sewage disposal system.

Before proceeding with our argument we wish to point out what we conceive to be erroneous statements in appellants' brief. The brief seems to proceed on the assumption that plaintiffs have an individual proprietary interest in Lake Tahkenitch. Thus reference is made to "the waters at the swimming beach and bathing resort of the plaintiffs" (Br. 5), and to defendant's "sewage disposal plant which emptied directly into the lake and close to the swimming float on plaintiffs' property" (Br.

6). The fact is that it is definitely agreed that plaintiffs own none of this lake, that it is the property of the State of Oregon, and that their property only abuts upon the lake (Complaint, Tr. of R. 2, Pretrial Order, Tr. of R. 27).

On page 5 after stating that the court excluded their offer of proof with respect to defendant's sewage disposal plant the statement is made that plaintiffs duly excepted to the said ruling of the court. We find nothing in the record on this point except the bare offer of proof—nothing with respect to objections to it, nor the ruling of the court thereon nor any exceptions.

On page 8 criticism is directed to the trial court for stating in its instructions that plaintiffs had "closed their property" on July 9, 1944. It is stated that this "was an arbitrary conclusion not warranted by the facts as shown by the stipulation of the parties set forth in the transcript of record." Of course this stipulation was not before the court; it was executed more than a year after the trial. The court's conclusion that plaintiffs had "closed their property" was based upon the evidence at the trial. Furthermore, the stipulation itself (Tr. of R. 50-1) is to the effect that plaintiffs had announced that on and after the above date "their resort would be closed to the public" and that on and after that date "the plaintiffs had excluded the general public from the premises and had built a fence between their premises and the public highway" and thereafter had used them "only as their residence and for the housing and entertainment of special guests whom they were willing to accept and who

made special reservations." We submit that even though the stipulation can be considered in this regard the court was correct in its statement that plaintiffs for all purposes pertinent to this case "closed their property."

On the same page appellants purport to tell the court the facts that would have been disclosed "if the full record were before this court"; among other things that "for a considerable portion of the time" after July 9, 1944 "the resort was fully occupied by guests who sent in special reservations." They then proceed with the argument that "this court will be able to appreciate the fact" that notwithstanding full occupancy when the "business" is conducted "in a limited manner," it "might be grievously impaired" by the alleged contamination of the bathing beach. We shall discuss these contentions later.

On page 10 there is what appears to us the most improper of appellants' statements in no way borne out by the record. It is here stated:

> "The very fact that the conduct of the business was such that plaintiffs deemed it necessary to their safety that they should bar the general public (including agents of the defendant) from their property should give some indication of the extent to which the defendant had gone in trespassing upon the rights of the plaintiffs to the peaceful enjoyment of their property."

The above statement is of course entirely unsupported by the evidence. In the scanty record before this court the only reference in the testimony with respect to closing the resort is that in May, 1944, appellants, or at least one of them, had a conversation with a newspaper

editor and authorized an article to the effect that he was closing the resort and thereafter would use it only as his private home, and that thereafter, on June 26, a letter was written that appellants intended to place their property up for sale (Tr. of R. 62-4).

SUMMARY OF APPELLEE'S ARGUMENT

The following is a summary of our argument:

First. The specification of errors set forth in appellents' brief (p. 4) are so vague and uncertain that they entirely fail to comply with Rule 20 (d) of this court and present no question for review.

Second. Appellants' offer of proof (Tr. of R. 74, Br. 3) purports to deal only with conclusions, sets forth no relevant facts, does not give names of witnesses, does not indicate that any witness was actually called, and is entirely insufficient as an offer of proof.

Third. The instruction of the court of which complaint is made (Tr. of R. 76, Br. 3-4) is not accompanied by any indication that appellants objected or excepted to the giving of the instruction or the grounds of any such objection or exception.

Fourth. Under the allegations of the complaint (Tr. of R. 8) and the provisions of the pretrial order (Tr. of R. 32) the measure of damages, if plaintiffs were entitled to recover, was limited to the extent to which the value of their property was reduced by the conduct of defendant, if any, and the loss of normal income from their property as the result of defendant's acts.

Fifth. The same measure of damages was applicable as a matter of substantive law.

Sixth. There is no evidence in the record indicating that the alleged contamination of the lake took place at any time prior to the filing of plaintiffs' complaint, or that if it did it caused any discomfort or annoyance either to appellants or to any of their guests, or any loss of income to appellants.

Seventh: Contamination of the lake would constitute a public and not a private nuisance.

Eighth: For the above reasons the court properly rejected the offer of proof.

ARGUMENT

Appellants' Specification of Errors Entirely Insufficient

Rule 20 (d) of this Honorable Court directs that with certain exceptions not here material, appellants' brief shall contain "a specification of errors relied upon which shall be numbered and shall set out separately and particularly each error intended to be urged." The rule further provides:

> "When the error alleged is to the admission or rejection of evidence the specification shall quote the grounds urged at the trial for the objection and the full substance of the evidence admitted or rejected, and refer to the page number in the printed or typewritten transcript where the same may be found. When the error alleged is to the charge of

> the court, the specification shall set out the part referred to in *totidem verbis*, whether it be in instruction given or in instruction refused together with the grounds of the objections urged at the trial."

It is of course obvious that appellants have not complied with this rule. They have in fact not endeavored at all to indicate in their specification of errors any specific rulings of the court. This is manifest from a mere reading of their specifications. They are as follows (Br. 4).

> "(1) In assuming that under the pleadings the only damages to which the plaintiffs would be entitled would be damages by the way of loss of profits to their business as operators of a resort property.
>
> "(2) Also, in ruling, in effect, that the plaintiffs by barring the general public from the grounds of their resort on July 9, 1944, and afterwards conducting their business in a limited manner and only on the basis of accepting guests or parties who made special reservations, lost their right to any damages suffered by them to their property or property rights inflicted by the action of the defendant subsequent to said July 9, 1944."

This court has on many occasions held that parties must comply with the above rule and that upon their failure to set forth specifically and fully each of the alleged errors complained of together with the grounds of objections, the court will not search the record to supply the deficiency or consider any such alleged errors. Some of the decisions of this court so holding are:

> *United States v. Smith*, 55 Fed. (2d) 141, 143.
> *Dayton Rubber Manufacturing Co. v. Fabra*, 63

Fed. (2d) 865, 866.
Fidelity and Deposit Co. v. Lindholm, 66 Fed. (2d) 56, 60.
Peck v. Shell Oil Co., 142 Fed. (2d) 141, 143.

Appellants call attention in their brief to the fact that due to the illness of the court reporter they have been unable to obtain a complete transcript of the record. It may be that for this reason appellants should be excused from setting forth the specifications of error with the same particularity that would be required had they been able to obtain such a complete transcript. But this we submit is no excuse for the vague generality of appellants' specifications. To merely state that the court was in error "in assuming that under the pleadings" damages were restricted to loss of profits or that the court erred "in ruling, in effect," that damages accruing subsequent to July 9, 1944, were not recoverable specifies no error whatsoever. It does not indicate whether in either instance the error was in the exclusion or reception of evidence, in restricting the purpose for which evidence was received, in limiting the scope of argument, in the giving of instructions or the refusal thereof, or anything else.

We look to other portions of the brief for these specifications and we find there that "it seems only necessary to direct attention to an excerpt from the trial proceedings, consisting of an offer of proof . . . and a portion of the court's instructions. . . ." (Br. 2-3). We shall discuss this so-called offer of proof and these instructions later. At this point we merely wish to note that (1) neither this so-called offer of proof nor the instructions is mentioned in either specification of error, and (2)

while we do not wish to minimize the handicap of appellants in being unable to secure a complete transcript it should be noted that they were able to obtain considerably more than they refer to in the brief. The portion of the instructions referred to in the brief (pp. 3-4) is only a small part of the instructions that they actually were able to obtain from the reporter (Tr. of R. 74-7). So we believe it may logically be assumed that if objections or exceptions were taken to the instruction of which complaint is made appellants could, if they desired, obtain a transcript thereof, together with the grounds of the objection.

Be that as it may, in view of the above and of the state of the record we feel that the utmost which we not only can be expected to discuss but with propriety may discuss, are those points which appellants state "it seems only necessary to direct attention to" (Br. 2), that is the "offer of proof" (Br. 3) and the quoted instructions of the court (Br. 3-4).

Appellants' Offer of Proof Was Inadequate to Present Any Question

Offers of proof are of course necessary under the Federal Rules of Civil Procedure, as they were at Common Law. *Jantz v. United States*, 127 Fed. (2d) (8 CCA) 498, and cases cited at page 503. Prior to the adoption of the rules the requisites of an offer of proof were governed by the Conformity Act. Rule 43(c) provides:

"In an action tried by a jury, if an objection to

> a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness."

In other words, the purpose of the offer is to determine whether or not a ruling *theretofore* made by the court in sustaining an objection to a question is, if error, prejudicial. The above rule accordingly recognizes the pre-existing practice which existed in most states that prior to the making of the offer of proof a witness must have actually been called to the witness stand, a question must have been propounded to him and an objection to the question sustained. And the attorney must make "a specific offer of what he expects to prove by the answer of the witness."

A good opinion outlining the requisites of an offer of proof is that of Mr. Justice McCamant (later a member of this Honorable Court) in *Columbia Realty Investment Co. v. Alameda Land Co.*, 87 Ore. 277, 168 Pac. 64, 440. It is there pointed out that the better practice requires that prior to the making of an offer of proof a witness must be called and asked an appropriate question (87 Ore. p. 290), although some decisions (including *Scotland County v. Hill*, 112 U.S. 183) only required that the witness be named.

In the opinion on rehearing (87 Ore. p. 296) the court after citing many authorities drew the following conclusions:

> "An offer of proof should state facts rather than conclusions. Its language should not be vague, but distinct; not general, but specific. It is not sufficient that it state the ultimate facts in the language ap-

propriate to a pleading; the evidentiary facts must be set out."

See also to the same effect 4 Nichols Applied Evidence, pp. 3355-7.

Now when we turn to appellants' offer of proof (Br. 3) we find that all the above rules were violated. In addition to the fact that no witness was actually called to the stand, none is named. Reference was made to "State Health Officer." The recital of what was intended to be proved by that official was that "the sewage disposal plant of the defendant was improperly installed in violation of the Oregon statute with reference to installation of sewage disposal plants and was dangerous, and that it was so installed as to be liable to contaminate the water at the swimming and bath resort of the plaintiff."

In answer to a query from the court, counsel stated that the plant was installed subsequent to July 9, 1944 "I think." It was then stated that the appellee had been warned "that the same was wrong and dangerous — was warned by a licensed plumber" — whether it was inintended to prove this by the State Health Officer or otherwise is not disclosed. The offer then proceeds that "we would prove by expert testimony of actual tests made by the experts personally that the water at the plaintiffs' said bathing beach was and is actually contaminated by these sewers, rendering it unfit for use as a bathing resort."

The only effect of the above statement was to advise the court that somebody could testify to "actual tests made by the experts" and that there was available "ex-

pert testimony" to the effect that the water in the lake "was and is actually contaminated" and that if permitted to do so experts would say that the contamination was "by these sewers" with the effect of "rendering it unfit for use as a bathing resort" (We assume that appellants' attorney by referring to "the swimming and bath resort of the plaintiffs" did not mean to imply that plaintiffs owned any portion of the lake. The lake is owned by the State of Oregon, and plaintiffs only own abutting property. Tr. of R. 2-27).

It is of course manifest that the above offer merely states conclusions, without giving any underlying facts. Furthermore it gives no indication as to the time involved. There is no offer to prove that the sewage disposal plant was even installed prior to the date of the filing of the complaint. There is no indication as to when the tests were made that were to be the supposed basis of the "expert testimony." Even though we accept the conclusions set forth in the offer as properly admissible it goes no further than to state that the installation was such "as to be liable to contaminate" the waters of the lake and that at some time — it may have been during the trial of the case — tests were made to show that at that time the water was "actually contaminated."

Finally, there is certainly nothing in the offer to suggest that either of the appellants ever endeavored to swim in the waters of the lake, that they lost any profits by reason of the alleged contamination, that the alleged contamination was such as to "constitute a discomfort and annoyance and a very probable injury to health as

to the plaintiffs and their guests" (See Appellants' Br. 7), nor even that any person whether using the lake for swimming or otherwise had been aware of the contamination.

Certainly the offer of proof does not support appellants' statement that the sewage disposal plant "emptied directly into the lake and close to the swimming float on plaintiffs' property" (Br. 6). Without any suggestion that we can go outside the record to advise the court as to the construction of the sewage disposal plant, we believe we may properly state that the offer of proof is in no way inconsistent with a disposal plant properly equipped with septic tanks with outlets constructed in such a way that normally the effluent would seep into the ground and never reach the lake and that in normal times it so operated; but that in certain seasons of the year when the porosity of the soil due to weather conditions was less than had been anticipated a portion of it would flow into the lake, but not "close to the swimming float."

Under the Pleadings and the Pre-trial Order the Court Applied the Proper Measure of Damages

Neither the transcript of the record nor plaintiffs' brief discloses the reason for the rejection by the court of appellants' offer of proof. We believe that we may safely state that the rejection was based, not upon any of the inherent defects above pointed out, but upon the court's conception of the proper measure of damages to which plaintiffs were entitled if they recovered a verdict.

If that measure of damages was correct then it will necessarily follow that the court did not err either in rejecting the offer of proof or in giving to the jury the instruction of which appellants complain (Br. 3-4).

The complaint alleges (Tr. of R. 2-3) that plaintiffs are the owners of land "abutting on Lake Tahkenitch" in which they have invested "a large amount of money with the purpose of operating the said property as a recreational resort." At no place in the pleadings is there any allegation or even suggestion that this land is used for residential purposes. The first cause of suit after alleging numerous alleged wrongs on the part of defendant (that relating to the sewage disposal being on information and belief Tr. of R. 7) makes the following allegation with respect to damages (Par. V of First Cause of Action, Tr. of R. 8):

> "That by reason of the facts hereinbefore set forth said property of the plaintiffs has been and is rendered of little or no value as a recreational resort, and plaintiffs have lost (By Order 6/22/45 VOB) and will lose much of the normal income therefrom all to plaintiffs' damage in the full sum of $50,-000.00;"

Appellants also allege they are entitled to $100,000 punitive damages and the prayer of complaint (Tr. of R. 11) is that upon their first cause of action they recover $150,000.

Inasmuch as a pre-trial order was later entered, setting forth all the issues to be tried, it has perhaps been unnecessary to refer to Appellants' Complaint. That pre-trial order provides that "among the issues to be tried

by reason of plaintiffs' contentions" (Tr. of R. 30) is, if it be determined that plaintiffs are entitled to recover (Tr. of R. 32):

> ". . . then it is for the jury to determine *how much,* if any, *was the value of said property of the plaintiffs reduced* by the said conduct of the defendant, and *how much,* if any, *did the plaintiffs lose of the normal income from their said property* as the result of such act or acts." (Italics added).

The pre-trial order also has the following provision (Tr. of R. 39):

> "Ordered, Considered and Adjudged that the foregoing constitutes the Pre-Trial Order in the above entitled action and shall supersede the pleadings, and that the Pre-Trial Order shall not be amended in the trial except by consent or by order of the Court to prevent manifest injustice."

The pre-trial conference and the order entered as a result thereof are of course authorized by Rule 16 of the Rules of Civil Procedure. This rule provides that one of the purposes of the conference may be "the simplification of the issues" and provides that:

> "The court shall make an order which recites the action taken at the conference . . . and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice."

No objection was made by appellants to the entry of this pre-trial order. No request was made for an amendment of the complaint respecting the measure of damages or for an amendment of the pre-trial order. It is therefore clear that the measure of damages to be ap-

plied was as above stated. There was accordingly no occasion at the trial to consider any question of "discomfort and annoyance" or of "injury to health" even though there had been some evidence indicating discomfort, annoyance or injury to health, and the record shows none. Nor was there any offer of proof of any such element of damage.

The allegations of the complaint and the pre-trial order designated two types of damage: (1) Diminution in value of property and (2) loss of "normal income." But since the alleged acts on the part of the defendant were only temporary in nature — and for present purposes we are concerned only with the alleged sewage disposal system — the claimed depreciation of value was eliminated as a measure of damages. See *Porges v. Jacobs*, 75 Ore. 488, 147 Pac. 396, where the court held it was error for the trial court to admit depreciation in the market value of plaintiff's property caused by an alleged nuisance. The court said:

> "The reason why such evidence is inadmissible in cases of this kind is that the alleged nuisance is temporary and can be abated."

Court Properly Excluded Evidence of Sewage Disposal Plant

It will be recalled that in making his offer of proof (App. Br. 3) appellants' counsel stated that the sewage disposal system had been installed subsequent to July 9, 1944. It will also be recalled that prior to July 9, 1944 "plaintiffs had announced that on and after that date

their resort would be closed to the public and on and after that date the plaintiffs had excluded the general public from the premises and had built a fence between their premises and the public highway and had used the premises thereafter only as their residence and for the housing and entertainment of special guests whom they were willing to accept and who made special reservations to enter the premises for recreational purposes" (Tr. of R. 50-1).

In other words, for reasons satisfactory to themselves, appellants went out of business as resort owners on July 9, 1944. It is of interest to note, despite their charges that they lost income due to defendant's conduct, that prior to thus closing their resort their cabins were almost always filled to capacity during week-ends, and even during the middle of the week they often had to turn people away, and when they closed the resort on July 9 they had to cancel reservations for all of their cabins, they being entirely filled at that time (Tr. of R. 56-7). They now say that notwithstanding the fact that they closed down their business on July 9 — or as appellants put it "conducted the business in a limited manner" (Br. 8) — they should nevertheless have been permitted to introduce evidence of contamination of the lake which occurred subsequent to that time because, as they say, they "assume that this court will be able to appreciate the fact that a business thus conducted by the plaintiffs in a limited manner might be greviously impaired by the fact that their bathing beach was being rendered unusable and dangerous to health by the wrongful and un-

lawful action of the defendant." They make this contention despite their own volunteered statement that "for a considerable portion of this time the resort was fully occupied by guests who sent in special reservations" (Tr. of R. 8). We submit that, aside from the deficiencies of the offer of proof, appellants' contention is unsound, and for three reasons.

First: As the trial court succinctly stated it: "I don't see how anybody could claim profits against somebody else if he decided for his own reasons to close his own business." (Tr. of R. 76). Appellants argue that the stipulation indicates that they were in business "in a limited manner." But this stipulation is to the effect that their place of business was "closed to the public" (Tr. of R. 50), in fact that they built a fence between their premises and the public highway — presumably to impress upon the public that the public was not welcome. Thereafter, aside from their own residence, they used the premises "for the housing and entertainment of special guests whom they were willing to accept and who made special reservations" (Tr. of R. 51).

Appellants do not suggest any theory, and we believe none can be evolved, to measure loss of income due to a third party's acts when this type of "business" is closed to the public and is being conducted under the above circumstances.

Second: No attempt was made by appellants to prove that subsequent to July 9, 1944, they suffered any loss of income because of the alleged contamination of the lake by any sewage disposal plant of appellee. Nor

was there any offer of proof of any evidence to indicate that any loss of income resulted from that fact, or anything else for which appellees might be said to be responsible. In fact there was no evidence of any diminution of income whatever (See Tr. of R. 53-62). And in their brief, as above pointed out, their only contention in that regard — after stating that "the full record" would show "that for a considerable portion of this time the resort was fully occupied by guests who sent in special reservations" — is that "this court will be able to appreciate" that the business would be "grievously impaired" and that "the owner's ardor for work and for soliciting patronage thereby would be dampened, if not destroyed." (Br. 8). This contention they make notwithstanding the fact that there is neither evidence nor offer of proof that the owners even knew about the alleged contamination during the time in question. There is, of course, no suggestion in the record that either the owners or any of their "special guests" ever bathed in the lake, or desired to do so, during this period of time, and certainly nothing indicates that any of them suffered any "discomfort and annoyance" by reason of this alleged contamination of the lake. Furthermore, as has already been pointed out, such elements of damage are not presented either in the pleadings or the pre-trial order.

Third: If, as appellants contend, the lake was contaminated by a wrongful act of appellee, the resulting wrong was in the nature of a public nuisance and not a private nuisance. It was a public wrong and not a private wrong. The remedy therefore lies with the State through its public officials and not with a private individual.

The case here presented must be distinguished from a situation where noxious or injurious odors flow over a person's property. It also must be distinguished from numerous cases where an upland owner contaminates waters of a stream to the damage of a lower riparian owner who has made a valid appropriation of waters of the stream and is damaged by the contamination. Likewise it must be distinguished from a case such as *Columbia Fisherman's Union v. St. Helens*, 160 Ore. 654, 87 Pac. (2d) 195, where plaintiffs had secured commercial fishing licenses to fish in the Columbia River and were injured in their trade and business by pollution of the river.

Upon the admission of Oregon to the Union it succeeded to the title to this lake, as well as to all other navigable waters of the state with the proviso that these navigable waters "shall be common highways and forever free, as well as to the inhabitants of said state as to all other citizens of the United States" (11 Statutes at Large, Chapter 33, Sec. 2, p. 383, 9 O.C.L.A. p. 72). By subsequent legislation this and all other meandered lakes are "declared to be navigable and public waters, and the waters thereof are hereby declared to be of public character . . . and the State of Oregon hereby asserts and declares its sovereignty over the same and its ownership thereof" (8 O.C.L.A. Sec. 121-503). The ownership of the State of Oregon is subject to "the public right of navigation and to the common right of the citizens of the state who fish therein." *Hume v. Rogue River Company*, 51 Ore. 237, 246, 83 Pac. 391, 92 Pac. 1065, 96

Pac. 865, and cases cited.

Accordingly, appellants have the same right to bathe in that lake as does every other citizen of the State of Oregon, and no more. The guests whom they invite to their premises have the same rights as the guests of owners of other property. If they suffered any damage or inconvenience (the record fails to disclose any) by reason of contamination of the lake it was of the same character as that of any other citizen who might desire to use the lake.

Under such circumstances it seems clear that the wrong, if any, attempted to be set forth in the offer of proof was in the nature of a public nuisance and not a private wrong. As stated by the Supreme Court of Oregon in *State v. Ringold*, 102 Ore. 401, at 404, 202 Pac. 734:

> "A nuisance is public where it affects the rights enjoyed by citizens as part of the public, that is, the rights to which every citizen is entitled. A private nuisance is anything done to the hurt, annoyance or detriment of the lands or hereditaments of another, and not amounting to a trespass. The difference between public and private nuisances does not depend upon the nature of the thing done, but upon the question whether it effects the general public or merely some private individual. Therefore the same act or structure may be a public nuisance and also a private nuisance as to a person who is thereby caused a special injury other than that inflicted upon the general public;"

And of course appellants have no private right of action for what is only a public nuisance. *State v. Ringold,*

supra, 102 Ore. 401, 405, 202 Pac. 734.

Respectfully submitted,

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No. 11651

United States

Circuit Court of Appeals

For the Ninth Circuit.

SUZANNE FITZGERALD FAWCETT, GERALDINE FITZGERALD CALLAGHAN, GERALDINE FITZGERALD CALLAGHAN, as Executrix of the Last Will and Testament of Gerald Fitzgerald, Deceased, and EDWARD F. TREADWELL, Administrator of the Estate of Lillian Ryan Fitzgerald, Deceased,

Appellants,

vs.

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Appellee.

Transcript of Record

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Rotary Colorprint, 870 Brannan Street, San Francisco 5-25-47—60

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Decision of the Honorable Michael J. Roche,
District Judge.

In the District Court of the United States, Northern District of California, Southern Division

No. 25839 S

SUZANNE FITZGERALD FAWCETT, GERALDINE FITZGERALD CALLAGHAN, GERALDINE FITZGERALD CALLAGHAN as Executrix of the Last Will and Testament of GERALD FITZGERALD, Deceased, and EDWARD F. TREADWELL, Administrator of the Estate of Lillian Ryan Fitzgerald, Deceased,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

PETITION

Now come the plaintiffs above named and complaining of the defendant above named, allege as follows:

I.

That the plaintiff Suzanne FitzGerald Fawcett resides at the City of Piedmont, County of Alameda, California, in the Northern District of California, and the plaintiff Edward F. Treadwell resides at the City of Burlingame, County of San Mateo, California, in the Northern District of California.

II.

That this petition against the United States of

America is presented pursuant to the provisions of Section 24(20) of the Judicial Code as amended (28 U.S.C. 41(20)).

III.

That at the time of the wrongful, erroneous, illegal and inadvertent assessment and collection of estate tax herein alleged, the Collector of Internal Revenue for the Sixth District, California, by whom such tax or sum was collected, was Nat Rogan, who is now deceased.

IV.

At all times herein mentioned the plaintiff Edward F. Treadwell was the duly appointed, qualified and acting administrator of the estate of Lillian Ryan FitzGerald, deceased, until the discharge as herein alleged.

V.

Prior to any of the times herein mentioned, Lillian Ryan FitzGerald died, being at the time of her death a resident of the State of California, and leaving estate therein.

VI.

Within the time and in the manner provided by law, the administrator of the estate of Lillian Ryan FitzGerald duly elected to pay estate tax to the United States on said estate, on the value of the property of her estate one year after the time of the death of said decedent.

VII.

Thereafter the Commissioner of Internal Revenue of the United States made what purported to be an assessment of estate tax on the said estate at the value thereof one year after the date of death of said decedent in the sum of $47,502.59. The said assessment was purported to be made under the provisions of the Internal Revenue Code, Chapter 3, as amended. Of said assessment the sum of $1,289.72 purported to be based on subchapter A, basic estate tax, the sum of $4,318.42 purported to be based on the defense tax, subchapter C, and the sum of $41,-894.45 purported to be based on subchapter B, additional estate tax.

VIII.

Prior to the time said Commissioner made the said assessment, the Treasury Department of the United States had adopted certain regulations which provided for the inclusion in the gross estate of decedents dividends paid on corporate stock of such estate during the year following the date of death of the decedent, which regulations were entirely illegal and unauthorized, and the same were declared to be illegal by the Supreme Court of the United States in the case of Maass v. Higgins, 312 U.S. 443, 85 L. ed. 940, decided on March 3, 1941. Following the said decision, and on May 22, 1941, said regulations were changed to comply with the said decision.

IX.

Notwithstanding the premises, the said Commissioner wrongfully and illegally and inadvertently

added to the value of the gross estate of said decedent the sum of $27,199 declared and received by said estate during the year next ensuing the date of the death of decedent as dividends on stocks owned by said decedent and her estate.

X.

The said inclusion of said dividends increased the tax legally assessable in the sum of $5,026.38, which amount was paid on the 12th day of January, 1942, to Nat Rogan, Collector of Internal Revenue of the United States for the Sixth District, California.

XI.

The inclusion of said amount in computing said tax was not authorized by law, was wrongful, erroneous and illegal, and inadvertent.

XII.

Thereafter, and on the 21st day of December, 1942, the Superior Court of the State of California, in and for the County of Los Angeles, having jurisdiction of the administration of the estate of said Lillian Ryan FitzGerald, duly distributed all of the property of the said decedent and her estate to her children, Geraldine FitzGerald Callaghan, Suzanne FitzGerald Fawcett and Gerald FitzGerald, and discharged the said administrator. On the 5th day of June, 1943, said Gerald FitzGerald entered the armed forces of the United States, and went overseas on or about the 12th day of January, 1945, and re-

mained overseas, in the United States Army Air Force, until his death in action on March 2, 1945. Thereafter, and after due and regular proceedings had in the Superior Court of the State of California, in and for the County of Los Angeles, having jurisdiction over the estate of the said Gerald FitzGerald, deceased, said Court duly appointed Geraldine FitzGerald Callaghan as executrix of the last will and testament of the said Gerald FitzGerald, deceased, and she duly qualified as such and ever since has been and now is the duly appointed, qualified and acting executrix of the last will and testament of the said Gerald FitzGerald, deceased. At all the times up to his death, the said Gerald FitzGerald was a minor.

XIII.

Thereafter and on the 16th day of November, 1945, said Geraldine FitzGerald Callaghan, Suzanne Fitzgerald Fawcett, Geraldine FitzGerald Callaghan as executrix of the will of Gerald FitzGerald, deceased, and Edward F. Treadwell, administrator of the estate of Lillian Ryan FitzGerald, deceased, duly filed and presented to the Commissioner of Internal Revenue of the United States, on Form 843, a claim for the refunding of said sum of $5,026.38, together with interest from January 12, 1942, in which it was stated that the estate tax return was filed in Los Angeles, California, the amount of the tax and date of payment, and the said amount for which refund was claimed, and that the time within which the claim could be legally filed expired under

Section 3313 of the Internal Revenue Code on January 12, 1946, and set forth that the said claim should be allowed for the reasons set forth in this complaint.

XIV.

Thereafter and on the 28th day of December, 1945, the United States Commissioner of Internal Revenue rejected said claim.

Wherefore, plaintiffs pray judgment against said defendant for the sum of $5,026.38, together with interest at 6% per annum from January 12, 1942.

REGINALD S. LAUGHLIN,
Attorney for Plaintiffs.

State of California,
City and County of San Francisco—ss.

Edward F. Treadwell, being first duly sworn, deposes and says: That he is one of the plaintiffs in the foregoing petition; that he has read said petition and knows the contents thereof, and that the same is true of his own knowledge except as to those matters which are therein stated on information and belief, and that as to those matters he believes it to be true.

EDWARD F. TREADWELL.

Subscribed and sworn to before me this 4th day of April, 1946.

[Seal] LULU P. LOVELAND,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed April 5, 1946.

[Title of District Court and Cause.]

ANSWER

Now comes the defendant, United States of America, by its attorney, Frank J. Hennessy, United States Attorney for the Northern District of California, and in answer to plaintiffs' complaint admits, denies and alleges as follows:

First Defense

The claim for refund referred to in paragraph XIII of the complaint was not filed within the time prescribed by Section 910 of the Internal Revenue Code.

Second Defense

1.

Admits the allegations contained in paragraph I thereof.

2.

Admits the allegations contained in paragraph II thereof.

3.

Answering the allegations contained in paragraph III thereof, defendant admits only that the tax was collected by Nat Rogan, now deceased.

4.

Admits the allegations contained in paragraph IV thereof.

5.

Admits the allegations contained in paragraph V thereof.

6.

Admits the allegations contained in paragraph VI thereof.

7.

Admits the allegations contained in paragraph VII thereof.

8.

The defendant makes no answer to the allegations contained in paragraph VIII of the complaint for the reason that said allegations are conclusions of law and not allegations of fact.

9.

As concerns paragraph IX, defendant admits only that the Commissioner added to the value of the gross estate of said decedent the sum of $27,199 declared and received by said estate during the year next ensuing the date of the death of decedent as dividends on stocks owned by said decedent and her estate.

10.

Admits the allegations contained in paragraph X thereof.

11.

The defendant makes no answer to the allegations contained in paragraph XI of the complaint for the

reason that said allegations are conclusions of law and not allegations of fact.

12.

Admits the allegations contained in the first portion of paragraph XII, i.e., that on the 21st day of December, 1942, the Superior Court of the State of California, in and for the County of Los Angeles, having jurisdiction of the administration of the estate of said Lillian Ryan FitzGerald, distributed all of the property of the said decedent and her estate to her children, Geraldine FitzGerald Callaghan, Suzanne Fitzgerald Fawcett and Gerald FitzGerald, and discharged the said administrator. As concerns the remainder of the said paragraph, defendant is without knowledge or information sufficient to form a belief as to the truth of the averments therein set forth.

13.

As concerns paragraph XIII defendant, without admitting that Edward F. Treadwell was in fact administrator of the estate of Lillian Ryan FitzGerald, concedes that on the date stated (or on November 19, 1945) a refund claim was filed as alleged. Without admitting that the claim was timely or that Section 3313, Internal Revenue Code, affects this case, defendant admits that the claim filed made the statements averred.

14.

Admits the allegations contained in paragraph XIV thereof.

Wherefore, having fully answered, defendant prays that plaintiffs take nothing by their complaint and that defendant be hence dismissed with its costs in its behalf expended.

FRANK J. HENNESSY,
United States Attorney.
WILLIAM E. LICKING,
Asst. United States Attorney,
Attorneys for Defendant.

[Endorsed]: Filed July 24, 1946.

[Title of District Court and Cause.]

AFFIDAVIT

County of Los Angeles,
State of California—ss.

Geraldine FitzGerald Callaghan, being first duly sworn, deposes and says:

That she is one of the plaintiffs in the above-entitled action, and is a sister of Gerald Fitzgerald, now deceased. On the 5th day of June, 1943, said Gerald Fitzgerald entered the armed forces of the United States and went overseas on or about the 12th day of January, 1945, and remained overseas in the United States Army Air Force until his death in action on March 2, 1945. Information of his death in action on the date thereof came to affiant from the officials of the United States Army Air Force.

GERALDINE FITZGERALD
CALLAGHAN.

Subscribed and sworn to before me this 22nd day of October, 1946.

[Seal] /s/ L. CARDER,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires May 30, 1950.

PLAINTIFF'S EXHIBIT No. 1

In the Superior Court of the State of California in and for the County of Los Angeles

Case No. 245609

In the Mater of
THE ESTATE OF GERALD FITZGERALD
Deceased

LETTERS TESTAMENTARY

State of California,
County of Los Angeles—ss.

The Last Will of Gerald Fitzgerald, deceased, having been proved in the Superior Court of the County of Los Angeles, Geraldine F. Callaghan, who is named therein as such, is hereby appointed Executrix.

Witness, J. F. Moroney, Clerk of the Superior

Court of the County of Los Angeles, with the seal of the Court affixed, the 14 day of August, 1945.

By order of the Court.

[Seal] J. F. MORONEY,
County Clerk.
By MARIE McCARTHY,
Deputy.

State of California,
County of Los Angeles—ss.

I do solemnly swear that I will support the Constitution of the United States, and the Constitution of the State of California, and that I will faithfully perform, according to law, the duties of Executrix of the last Will and Testament of Gerald Fitzgerald, deceased.

GERALDINE F. CALLAGHAN.

Subscribed and sworn to before me, this 14 day of August, 1945.

[Notary Seal] H. B. PARKHURST,
Notary Public in and for the County of Los Angeles,
State of California.

State of California,
County of Los Angeles—ss.

I, J. F. Moroney, County Clerk and ex-officio Clerk of the Superior Court within and for the county and state aforesaid, do hereby certify the foregoing to be a full, true and correct copy of the original Letters Testamentary issued herein, as the

same appears on file in my office, and I further certify that said Letters have not been revoked and are in full force and effect at the present time.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Superior Court this 15th day of August, 1946.

[Seal] J. F. MORONEY,
County Clerk.
By G. J. HOWARD,
Deputy.

[Endorsed]: Filed Aug. 14, 1945.

[Endorsed]: Filed U.S.D.C. Nov. 20, 1946.

In the Southern Division of the United States District Court for the Northern District of California

No. 25839-S

SUZANNE FITZGERALD FAWCETT, GERALDINE FITZGERALD CALLAGHAN, GERALDINE FITZGERALD CALLAGHAN, as Executrix of the Last Will and Testament of GERALD FITZGERALD, Deceased, and EDWARD F. TREADWELL, Administrator of the Estate of Lillian Ryan Fitzgerald, Deceased,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER FOR JUDGMENT

It is hereby ordered that a Judgment of Dismissal be entered herein on findings of fact and conclusions of law.

Dated March 11th, 1947.

MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed March 11, 1947.

[Title of District Court and Cause.]

Action for refund of federal estate taxes. Action dismissed in accordance with opinion.

Reginald S. Laughlin, of San Francisco, California, attorney for plaintiffs.

Frank J. Hennessy, United States Attorney, and William E. Licking, Assistant United States Attorney, attorneys for defendant.

MEMORANDUM OPINION

Roche, District Judge:

This is an action by certain distributees and the executrix of a deceased distributee, of the estate of Lillian Ryan Fitzgerald, to recover the sum of $5,026.38, assessed as estate tax, with interest thereon from January 12, 1942, the date of payment. This assessment resulted from the Commissioner of Internal Revenue having included in the value of the gross estate the sum of $27,199.00 received during the year subsequent to the decedent's death as dividends on stock owned by the decedent. Defendant admits that this assessment was erroneous and illegal and the sole question for decision is whether the claim for refund was timely filed.

Plaintiffs filed their claim on November 16, 1945, some three years and ten months after payment of the tax, and the Commissioner rejected it on the ground that it had not been filed within the three-year period provided by Sec. 910 of the Internal Revenue Code (26 U.S.C. 910). So far as pertinent, that section provides: "All claims for the re-

funding of the tax imposed by this subchapter (the Basic Estate Tax) alleged to have been erroneously or illegally assessed or collected must be presented to the Commissioner within three years next after the payment of such tax."

Plaintiffs contend that since the assessment was erroneous and illegal, it falls within the provisions of Sec. 3313, Internal Revenue Code (26 U.S.C. 3313), and their claim was timely if filed within four years from the date of payment. The pertinent provisions of that section are as follows: "All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, * * * or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes, be presented to the Commissioner within four years next after the payment of such tax * * *."

In support of their position, plaintiffs rely on cases that have followed the decision of the Ninth Circuit Court of Appeals in Huntley v. Southern Oregon Sales, Inc., 102 F. 2d 538. There income taxes were collected from a co-operative association that was exempt by law from taxation and the question was wether the two-year limitation period provided by Sec. 322(b) (1) of the Revenue Act of 1928 to cover claims for refund of overpayment of income tax, or the four-year limitation period covering refund claims for an erroneously or illegally collected tax, should govern. In holding that the

four-year statute controlled, the court drew the well recognized distinction between an "overpayment" of a tax legally due and an "illegal assessment" of a tax and concluded that since the two-year limitation period applied only to an overpayment of income tax, it did not cover the case where the tax had been erroneously and illegally collected.

The Huntley case is thus clear authority for the rule that where a tax statute provides a specific limitations period within which claims for refund of an overpayment can be filed, such limitations period is not applicable to a claim for refund of an illegally or erroneously assessed tax. It would seem, however, to have no application to the instant situation since, by its very terms, the limitation period covering claims for refund of estate taxes is applicable only to those taxes "alleged to have been erroneously or illegally assessed or collected." It says nothing about "overpayments."

In the language of the Supreme Court in Rosenman v. United States, 323 U.S. 658, 661: "Claims for tax refunds must conform strictly to the requirements of Congress. A claim for refund of an estate tax 'alleged to have been erroneously or illegally assessed or collected must be presented to the Commissioner within three years next after the payment of such tax.' On the face of it, this requirement is couched in ordinary English, and, since no extraneous revelant aids to construction have been called to our attention, Congress has evidently meant what these words ordinarily convey."

Plaintiffs' only authority directly in point is In

re Tindle's Estate, 59 F. Supp. 667, affirmed without comment in 152 F. 2d 756, which involved an illegal assessment of estate tax. The trial court there held Sec. 3313 with its four-year limitation period applicable. However, since that decision followed Rosenman v. United States (supra) by only a few weeks, it may be that the Supreme Court case was not called to the court's attention.

In view of the language of the statute and of the Supreme Court, the court is compelled to dismiss this suit for lack of jurisdiction, the claim not having been timely filed, and it is so Ordered. The respective parties will pay their own costs.

Dated: March 11th, 1947.

MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed Mar. 11, 1947.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly to be tried on November 20, 1946, plaintiffs appearing by Reginald S. Laughlin, their attorney, and the defendant by William E. Licking, Assistant United States Attorney; evidence both oral and documentary was introduced and received and the cause having been fully heard, argued by counsel, briefed,

and on February 8 submitted, and the Court being fully advised in the premises on March 11, 1947, ordered that a judgment of dismissal be entered herein.

Now, Therefore, the Court makes the following

Findings of Fact

I.

The Court finds that it is true that the plaintiff Suzanne FitzGerald Fawcett resides at the City of Piedmont, County of Alameda, California, in the Northern District of California, and the plaintiff Edward F. Treadwell resides at the City of Burlingame, County of San Mateo, California, in the Northern District of California.

II.

That this petition against the United States of America seeks to recover taxes alleged to have been erroneously and illegally assessed and collected and is presented pursuant to the provisions of Section 24 (20) of the Judicial Code as amended (28 U.S.C. 41 (20)).

III.

That at the time of the collection of estate tax herein, the Collector of Internal Revenue for the Sixth District, California, by whom such tax or sum was collected, was Nat Rogan, who is now deceased.

IV.

At all times herein mentioned the plaintiff Edward F. Treadwell was the duly appointed, qualified

and acting administrator of the estate of Lillian Ryan FitzGerald, deceased, until his discharge as hereinafter set out.

V.

Prior to any of the times herein mentioned, Lillian Ryan FitzGerald died, being at the time of her death a resident of the State of California, and leaving estate therein.

VI.

Within the time and in the manner provided by law, the administrator of the estate of Lillian Ryan FitzGerald duly elected to pay estate tax to the United States on said estate, on the value of the property of her estate one year after the time of the death of said decedent. Thereafter the Commissioner of Internal Revenue of the United States made an assessment of estate tax on the said estate at the value thereof one year after the date of death of said decedent.

VII.

Prior to the time said Commissioner made the said assessment, the Treasury Department of the United States had adopted certain regulations which provided for the inclusion in the gross estate of decedents dividends paid on corporate stock of such estate during the year following the date of death of the decedent.

VIII.

The Commissioner added to the value of the gross estate of said decedent the sum of $27,199 declared

and received by said estate during the year next ensuing the date of the death of decedent as dividends on stocks owned by said decedent and her estate.

IX.

This inclusion of dividends increased the tax assessed in the sum of $5,026.38, which additional amount was paid on the 12th day of January, 1942, to Nat Rogan, Collector of Internal Revenue of the United States for the Sixth District of California.

X.

Thereafter, and on the 21st day of December, 1942, the Superior Court of the State of California, in and for the County of Los Angeles, having jurisdiction of the administration of the estate of said Lillian Ryan FitzGerald, duly distributed all of the property of the said decedent and her estate to her children, Geraldine FitzGerald Callaghan, Suzanne FitzGerald Fawcett and Gerald FitzGerald, and discharged the said administrator. Said Gerald FitzGerald died on March 2, 1945. Thereafter, and after due and regular proceedings had in the Superior Court of the State of California, in and for the County of Los Angeles, having jurisdiction over the estate of the said Gerald FitzGerald, deceased, said Court duly appointed Geraldine FitzGerald Callaghan as executrix of the last will and testament of the said Gerald FitzGerald, deceased, and she duly qualified as such and ever since has been and now is the duly appointed, qualified and acting executrix of the last will and testament of

the said Gerald FitzGerald, deceased. At all the times up to his death, the said Gerald FitzGerald was a minor.

XI.

Thereafter and on the 16th day of November, 1945, said Geraldine FitzGerald Callaghan, Suzanne FitzGerald Fawcett, Geraldine FitzGerald Callaghan as executrix of the will of Gerald FitzGerald, deceased, and Edward F. Treadwell, administrator of the estate of Lillian Ryan FitzGerald, deceased, filed and presented to the Commissioner of Internal Revenue of the United States, on Form 843, a claim for the refunding of said sum of $5,026.38, together with interest from January 12, 1942. On December 28, 1945, the Commissioner rejected said claim as not timely filed.

From the foregoing Findings of Fact the Court makes the following

Conclusions of Law

I.

The Court has jurisdiction since this is a suit against the United States to recover Internal Revenue taxes alleged to have been illegally and wrongfully collected;

II.

Plaintiffs named are the proper parties plaintiff since they are the distributees of the estate from which the tax was collected;

III.

The action may not be maintained in this or any Court since the claim for refund upon which it is based was not filed with the Commissioner of Internal Revenue of the United States within the time provided by law for such filing;

IV.

That plaintiffs should recover nothing by virtue of said action and that the defendant United States of America is entitled to a judgment dismissing said action and for its costs of suit therein incurred.

Let a judgment be entered accordingly.

Done in Open Court this 14th day of April, 1947.

/s/ MICHAEL J. ROCHE,
United States District Judge.

Approved as to form as provided by Rule 5d.

REGINALD S. LAUGHLIN,
Attorney for Plaintiffs.

[Endorsed]: Filed April 14, 1947.

In the Southern Division of the United States District Court for the Northern District of California

No. 25839-S

SUZANNE FITZGERALD FAWCETT, et al.,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT OF DISMISSAL

The above entitled cause came on regularly to be tried on November 20, 1946, plaintiffs appearing by Reginald S. Laughlin, their attorney, and the defendant by William E. Licking, Assistant United States Attorney; evidence, both oral and documentary, was introduced and received and the cause having been fully heard, argued by counsel, briefed, and on February 8 submitted, and the Court being fully advised in the premises on March 11, 1947, ordered that a judgment of dismissal be entered herein, and the Court having heretofore made, signed and ordered filed herein its Findings of Fact and Conclusions of Law, which are by reference made a part hereof;

Wherefore, by reason of the premises It Is Hereby Ordered, Adjudged and Decreed that plaintiffs take nothing by virtue of their complaint herein and that said action be and the same is hereby dismissed.

It Is Further Adjudged and Decreed that the defendant have and recover from plaintiffs its costs of suit herein incurred as taxed in the amount of $.....

Dated: This 14th day of April, 1947.

/s/ MICHAEL J. ROCHE,
United States District Judge.

Approved as to form as provided in Rule 5(d).

REGINALD S. LAUGHLIN,
Attorney for Plaintiff.

[Endorsed]: Filed and Entered April 14, 1947.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the defendant in the above-entitled action and to Messrs. Frank J. Hennessy and William E. Licking, attorneys for defendant:

You and Each of You Will Please Take Notice that the plaintiffs in the above-entitled action hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment given, made and entered in the above-entitled action, and from the whole thereof.

REGINALD S. LAUGHLIN,
Attorney for Plaintiffs.

(Receipt of Service of Copy.)

[Endorsed]: Filed April 17, 1947.

[Title of District Court and Cause.]

PRAECIPE FOR PREPARATION OF RECORD ON APPEAL

To the Clerk of the above-entitled Court:

Plaintiffs having filed herein their Notice of Appeal in the above-entitled action, you are hereby requested to prepare record on appeal consisting of the following:

1. Petition.
2. Answer.
3. Affidavit of Geraldine Fitzgerald Callaghan admitted in evidence on the trial.
4. Letters Testamentary in the Estate of Gerald Fitzgerald, Deceased, admitted in evidence on the trial.
5. Opinion of the Court.
6. Findings.
7. Judgment.
8. Notice of Appeal.
9. Copy of this Praecipe.

REGINALD S. LAUGHLIN,
Attorney for Plaintiffs.

(Receipt of Service of Copy.)

[Endorsed]: Filed April 17, 1947.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellants herein may have to and

including July 6, 1947, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: May 27, 1947.

MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed May 27, 1947.

District Court of the United States, Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 29 pages, numbered from 1 to 29, inclusive, contain a full, true, and correct transcript of the records and proceedings in the matter of Suzanne Fitzgerald Fawcett, et al., Plaintiffs, vs. United States of America, Defendant, No. 25839-S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of $3.80 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at

San Francisco, California, this 7th day of June, A.D. 1947.

[Seal] C. W. CALBREATH,
Clerk.
/s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 11651. United States Circuit Court of Appeals for the Ninth Circuit. Suzanne Fitzgerald Fawcett, Geraldine Fitzgerald Callaghan, Geraldine Fitzgerald Callaghan, as Executrix of the Last Will and Testament of Gerald Fitzgerald, deceased, and Edward F. Treadwell, Administrator of the Estate of Lillian Ryan Fitzgerald, deceased, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed June 9, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11651

SUZANNE FITZGERALD FAWCETT, GERALDINE FITZGERALD CALLAGHAN, GERALDINE FITZGERALD CALLAGHAN, as Executrix of the Last Will and Testament of GERALD FITZGERALD, Deceased, and EDWARD F. TREADWELL, Administrator of the Estate of Lillian Ryan Fitzgerald, Deceased,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL

I.

The claim for refund is governed by 26 U.S.C.A., Section 3313, and was seasonably made.

II.

The claim for refund is not governed by 26 U.S.C.A., Section 910.

/s/ REGINALD S. LAUGHLIN,
Attorney for Plaintiffs.

Receipt of copy of within acknowledged this 13th day of June, 1947.

/s/ FRANK J. HENNESSY,
United States Attorney.
Per T. S.

[Endorsed]: Filed June 13, 1947.